

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, :
 :
 :
v. : CRIMINAL INDICTMENT
 : NO. 1:06-CR-382
STEPHEN D. SMITH, :
 :
 :
Defendant. :

DEFENDANT STEPHEN D. SMITH'S MOTION IN LIMINE
TO LIMIT THE SCOPE OF CROSS-EXAMINATION OF ACCUSED
DURING THE HEARING OF DEFENDANT'S MOTION TO SUPPRESS
WITH CITATION OF AUTHORITY

COMES NOW DEFENDANT, Stephen D. Smith, by and through his undersigned counsel, and moves the Court in limine to limit cross-examination of him by the government at the hearing of his motion to suppress illegally seized evidence, and in support shows the court the following:

FEDERAL RULE OF EVIDENCE 104(d)

Rule 104(d) of the Federal Rules of Evidence provides that the "the accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case." The notes of the Advisory Committee make clear that this limitation upon cross-examination is "designed to encourage participation by the accused in the determination of preliminary matters. . .without exposing himself to cross-examination

generally. . .because of the breadth of cross-examination under Rule 611(b)."

While the rules of evidence do not usually apply to preliminary determinations in the absence of a jury, Rule 104(d) by its specific terms confers a privilege upon the accused if he decides to take the stand as a witness during a hearing of a preliminary matter such as his own motion to suppress illegally seized evidence. Thus, the privilege of being subject to a cross-examination limited to questions material to the issue of the legality of the challenged search and seizure, if he should choose to testify, is applicable.

WHEREFORE, Defendant Smith respectfully requests that the Court limit any cross-examination of him by the government if he decides to testify at the hearing of his motion to suppress illegally seized evidence to questions material to the issue of the legality of the challenged search and seizure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Defendant Stephen D. Smith's Motion in Limine To Limit the Scope of Cross-Examination of Accused During the Hearing of Defendant's Motion to Suppress upon counsel using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, Aaron Danzig and Randy Chartash.

This the 19th day of February, 2007.

/s/Edward D. Tolley

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